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Nos. 08-289, 08-294

In the
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT, ARIZONA PUBLIC INSTRUCTION
Petitioners

v.

MIRIAM FLORES, *ET AL.* ,
Respondents

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,
Petitioners

v.

MIRIAM FLORES, *ET AL.* ,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of the American Unity Legal Defense Fund, English Language Political Action Committee, ProEnglish and the Center for Equal Opportunity, As *Amici Curiae* Supporting Petitioners

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Questions Presented

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with the No Child Left Behind Act's extensive requirements for English-language instruction is sufficient to satisfy the Equal Educational Opportunities Act's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

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INTEREST OF AMICI

The American Unity Legal Defense Fund is an independent, national, non-profit educational organization dedicated to preserving our historical unity as Americans into the 21st Century.[1] www.americanunity.org. AULDF has filed *amici curiae* briefs in this Court, including in *Mohawk Industries v. Williams*, No. 05-465 (brief of the Immigration Political Action Committee and five other organizations), and *Crawford v. Marion County Election Board*, Nos. 07-21, 07-25.

The English Language Political Action Committee is an independent, bipartisan national committee devoted to promoting English as the Official Language.

ProEnglish is a member-supported, national, non-profit organization working to educate the public about the need to protect English as our common language and to make it the official language of the United States. www.proenglish.org. ProEnglish has been active in the courts, including providing essential support to proponents of an Arizona initiative to make English the official language. *Arizonans for Official English v. Arizona*, No. 95-974.

The Center for Equal Opportunity is a national, non-profit organization which opposes

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amici curiae* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief.

bilingual education, because it segregates students by national origin, encourages identity politics, and fails to teach children English. www.ceousa.org. CEO has assisted parents of English Language Learners to challenge ineffective bilingual education programs in several states.

PRELIMINARY STATEMENT

The decision below rests on two fundamental errors:

- A misunderstanding and misapplication of the *Castaneda* test long used to evaluate claims under the Equal Educational Opportunities Act ("EEOA"); and,
- A misunderstanding of the relationship between the EEOA and Title III of the No Child Left Behind Act ("NCLB").

Both errors, described in more detail below, stem from the failure of the Ninth Circuit to understand the evolution in methods for teaching English Language Learners. Demonstrating the errors requires a brief description of the three-decade-long movement from "bilingual education" to more effective English Immersion instruction.

"[T]he debate is a neutral one, about which system will provide LEP [Limited English Proficient] children with the best education to enable them to function as American citizens and enjoy the opportunities and privileges of life in the United States." *Valeria v. Davis,* 307 F.3d 1036, 1041 (9th Cir. 2002), *quoting*, *Valeria G. v. Wilson,* 12 F.Supp.2d 1007, 1014-15 (N.D. Cal. 1998) ("This court cannot discern from the face of Proposition 227 any hidden agenda of racial or national origin discrimination against any group").

The movement from "bilingual education" to "English language acquisition" is, to the leading authorities, a civil rights and enabling issue:

> Without competence in the standard language of the society, immigrants . . . are at a disabling disadvantage, unable to share in the economic opportunities of a democratic society. . . . The sooner this enabling skill is acquired, the sooner children can join in the full life of their school and community.

Rosalie Pedalino Porter, FORKED TONGUE: THE POLITICS OF BILINGUAL EDUCATION, 2nd ed. (1996), at 254.

A. "Bilingual Education:" Teaching English Language Learners in Their Native Languages:

Before *Lau v. Nichols*, 414 U.S. 563 (1974), efforts to teach English Language Learners were haphazard or non-existent. In *Lau*, for example, this Court noted that of 2,856 children of Chinese ancestry in the San Francisco school system who did not speak English, 1,800 received no supplemental instruction to teach them English. *Lau*, 414 U.S. at 564. California law at the time provided for assistance to those who could not speak English, but at the discretion of the school system. 414 U.S. at 565.

Justice Douglas, writing for the Court, found that the failure to provide at least some assistance violated Section 601 of Title VI of the Civil Rights Act of 1964, because it "denies them a meaningful opportunity to participate in the educational program." 414 U.S. at 568. This Court did not

mandate any particular form of assistance for language-minority children:

> No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation.

414 U.S. at 564-65.

One early attempt at teaching English Language Learners was "bilingual education." "'Bilingual education/native language instruction' means a language acquisition process for students in which *much or all instruction, textbooks, or teaching materials are in the child's native language* other than English." A.R.S. § 15-751.1 (2008) (emphasis added).

"Bilingual programs make use of students' native language in the classroom while developing English." Arizona Dept. of Education, *The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: a Large-Scale Comparison*, July 2004, at 1.

B. Bilingual Education Was Preferred by Federal Policies, But Proved Largely Ineffective:

In the Bilingual Education Act of 1974, 20 U.S.C. § 880b *et seq*. (1976), Congress expressly directed that the state and local agencies receiving funds under the Act were free to develop their own

programs. Conf.Rep. No. 93-1026, 93d Cong., 2nd Sess. (1974), *reprinted* in (1974) U.S.Code Cong. & Ad.News 4093, 4206.

The federal Department of Health, Education and Welfare, however, issued the so-called "*Lau* Guidelines," which promoted the use of bilingual education. "Following the Supreme Court's decision in *Lau*, HEW developed the '*Lau* Guidelines' as a suggested compliance plan for school districts which, as a result of *Lau*, were in violation of Title VI because they failed to provide any English language assistance to students having limited English proficiency." *Castaneda v. Pickard*, 648 F.2d 989, 1006 (5th Cir. 1981) ("*Castaneda*"). "Under the *Lau* Guidelines, plaintiffs argue, 'pressing English on the child is not the first goal of language remediation.'" *Id.*

> The *Lau* Guidelines were the result of a policy conference organized by HEW; these guidelines were not developed through the usual administrative procedures employed to draft administrative rules or regulations. The *Lau* Guidelines were never published in the Federal Register. Since the Department itself in its administrative decision found that RISD's [the Raymondville Independent School District's] departure from the *Lau* Guidelines was not determinative of the question whether the district complied with Title VI, we do not think that these guidelines are the sort of administrative document to which we customarily give great deference in our determinations of compliance with a statute.

Id.

Nevertheless, most federal funding and school system pedagogical decisions assumed the *Lau* Guidelines as a federal mandate, and suits, including the landmark *Castaneda* case, were brought alleging violations of the Guidelines. *Id.*

Over time, these bilingual education programs proved inadequate to teaching children either English or subject matter. In 1981, the U.S. Department of Education concluded that "the case for the effectiveness of 'Transitional Bilingual Education' is so weak that exclusive reliance on this instructional method is clearly not justified." Keith Baker, *et al.*, *Effectiveness of Bilingual Education: A Review of the Literature*, Technical Analysis Report Series, U.S. Dept. of Education, at 8 ("Dept. of Education Study").

In 1985, the Massachusetts Board of Education concluded that "it appears that bilingual programs *both* segregate them *and* fail to teach a substantial proportion of them the skills which, according to the *Lau* decision, are essential." Commonwealth of Massachusetts Board of Education, *Report No. 5 to the United States District Court, District of Massachusetts on Boston School Desegregation*, Vol. 2, July 15, 1985, at 74 (emphasis in original).

In 1992, a California State study examined 20 years of bilingual education, and found no evidence that native language instruction is beneficial, and also found that students are kept in bilingual education programs for too many years. Paul Berman, *et al.*, *Meeting the Challenge of Language Diversity: An Evaluation of Programs for Pupils of Limited Proficiency in English*, BW Associates, Berkeley, California, 1992, at 38.

In 1994, the Massachusetts Bilingual Education Commission analyzed 23 years of bilingual

education, and concluded that there was no evidence that "transitional bilingual education" programs produced good results. Massachusetts Bilingual Education Commission, *Striving for Success: The Education of Bilingual Pupils: A Report of the Bilingual Education Commission,* Boston, 1994.

In 1996, the Rossell/Baker study analyzed 76 reliable research studies on bilingual education, concluding there is no evidence that bilingual education programs are superior for teaching either English or subject matter. Christine Rossell, et al., *Bilingual Education in Massachusetts: The Emperor Has No Clothes*, Pioneer Institute, Boston, Massachusetts, 1996 ("Rossell").

In 1998, the National Research Council of the National Institutes of Medicine reviewed 29 years of bilingual education and concluded that there was no long-term advantage in teaching literacy in a child's native language and no negative effects from teaching English language literacy first. Commission on Behavioral and Social Sciences and Education, National Research Council, Institutes of Medicine *Educating Language Minority Children*, National Academy Press, Washington, D.C., 1998.

C. Some Schools Introduced New "English Immersion" Teaching Methods:

Some schools began using an alternative method of instruction: "immersing" the students in English, and providing special assistance in other languages only when needed. In 1981 the U.S. Department of Education described the rationale:

> The commonsense observation that children should be taught in a language they

> understand does not necessarily lead to the conclusion they should be taught in their home language. They can be successfully taught in a second language if it is done right. The key to successful teaching in the second language seems to be to insure that the second language and subject matter are taught simultaneously so that subject content never gets ahead of language. Given the American setting, where the language-minority child must ultimately function in an English-speaking society, carefully conducted second-language instruction in all subjects may well be preferable to bilingual methods.

Dept. of Education Study, at 8.

A 1996 Massachusetts review of 76 studies describes the English Immersion classroom:

> The language of instruction in a structured immersion program is English at a level the child can understand in a self-contained classroom of LEP students who are at approximately the same level of English language knowledge and the same age. The children in a structured immersion classroom do not have to be of the same language background, but the teacher should be trained in second language acquisition techniques. These programs should be fully integrated into regular schools so that students are exposed to English speakers on the playground, in the cafeterias, the halls, assemblies, and other areas before, during, and after school. LEP students should probably not remain in self-contained classrooms for more than a year, even if the language of instruction is English.

Rossell, *supra*, at 9.

Arizona law, enacted by Proposition 203,[2] defines one such method, known as Structured English Immersion ("SEI"):

> "Sheltered English immersion" or "structured English immersion" means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and all reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than

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[2] "Proposition 203 largely abolished bilingual education, replacing it with sheltered English immersion, a teaching method 'in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language.'" *Flores v. Arizona*, 516 F.3d 1140, 1149 (9th Cir. 2008).

Contrary to the lower court's assertion about bilingual education being "abolished," bilingual education teaching methods are still available in Arizona. A.R.S. §§ 15-752, 15-753 (2000). Structured English Immersion ("SEI") is the default instructional method; children who obtain waivers, based on educators' evaluations and parental consent, may be placed in bilingual education classrooms. *Id.* Approximately 7,900 students obtained waivers and participated in bilingual education programs in the 2002-03 academic year. Arizona Dept. of Education, *The Effects of Bilingual Education Programs and Structured English Immersion Programs on Student Achievement: a Large-Scale Comparison*, July 2004. ("Arizona Student Achievement Study"), at Table 1, P. 5. More than 65,000 students participated in SEI programs. *Id*.

> English, and children in this program learn to read and write solely in English.

A.R.S. § 15-751.5 (2008).

D. Structured English Immersion Proved More Successful Than Bilingual Education:

In 1992, the Research in English Acquisition and Development Institute studied El Paso, Texas's, "Bilingual Immersion Project," and found that, over the ten-year study period, Limited English Proficiency children in English immersion classes consistently outperformed children in native language instruction classes in both learning English and in subject matter. Russell Gersten, *et al*., *Bilingual Immersion: A Longitudinal Study*, READ Institute, Washington, D.C. 1992.

In 1994, the New York City Board of Education found that students in English as a Second Language classes (similar to immersion programs) exited their special program faster and did better in mainstream classrooms than students taught in their native language. New York City Board of Education, *Educational Progress of Students in Bilingual and ESL Programs: a Longitudinal Study, 1990-1994*.

The Arizona Department of Education reported that, in academic year 2002-03, "[T]hose students in SEI programs significantly outperformed bilingual students in 24 out of 24 comparisons. . . . [B]ilingual students are more than a year behind their SEI counterparts in seventh and eighth grade." Arizona Student Achievement Study, at 3.

Similar results were achieved in California.

> California made headlines across the country when test scores were released after the passage of Proposition 227. Opponents of the law had predicted it would spell disaster for English learners. But quite the opposite occurred. Only a quarter of English learners scored in the top two proficiency categories on the California English Language Development Test (CELDT) in 2001, shortly after Proposition 227 was implemented, and the first year the exam was given. By 2005, almost half did – 47 percent.

Kelly Torrance, *Immersion Not Submersion: Lessons from Three California Districts' Switch From Bilingual Education to Structured Immersion*, Vol. II. Lexington Institute, Arlington, VA, 2006, at 4.

In addition, those who completed the program sometimes outdid native English-speakers in test performance.

> A larger group of students start as English Learners but achieve proficiency, making them Reclassified Fluent English Proficient (RFEP). These students "do just as well as, and, in some cases, even better than non-EL students on every state standardized academic test, including the California Standards Test, the Stanford Assessment Test and the California High School Exit Exam," notes the 2007 Evaluation Report on the California High School Exit Exam (CAHSEE) by Human Resources Research Organization.

Joanne Jacobs, *The Education of J*A*I*M*E C*A*P*E*L*L*A*N: English Learner Success in California Schools*. Lexington Institute. Arlington, VA, 2008, at 5.

"Remarkably, 52 percent of reclassified students passed the college-prep courses required by the University of California and California State University systems in 2003, compared to only 32 percent of students who speak English as their first language." *Id*., at 7.

E. Parents and Educators Began Rejecting Bilingual Education Programs and Advocating for English Immersion Programs:

Given these dramatic differences in success rates, it was inevitable that parents and caring educators began clamoring for more successful programs for English Language Learners. "Over the past few years, the Committee has heard a growing number of complaints from parents whose children have been placed and retained in bilingual education courses without their permission or knowledge. In many instances, these parents faced great resistance in their efforts to remove their children from such programs." Comm. On Ed. & the Work Force, "No Child Left Behind Act of 2001," H.R. Rep. 107-63, Pt. 1, at 277.

One was Rita Montero, a member of the Denver, Colorado, School Board, and once a supporter of bilingual education, who changed her view: "As a mother whose child was forced to stay in this program, I know its problems first-hand."[3] Montero's son, Camilo, was put into a bilingual education class, at her request. Her second-grade son had been doing

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[3] Rita Montero, "A Tale of Two Tongues," *Denver Post*, May 25, 1997.

fractions and adding three digit numbers, but his bilingual education class was far behind Camilo's capabilities: "So I said to the teacher this is it; I want him to be taken out and put in an English-speaking class."[4]

Similar parent and educator disquiet over bilingual education's failures led to successful voter initiatives in California (1998), Arizona (2000), and Massachusetts (2002):

> Well, the overwhelming practical evidence is that bilingual education has failed on every large scale case that's been tried in the United States, in particular in California. The origins of this initiative was the case last year of a lot of immigrant Latino parents in downtown LA, who had to begin a public boycott of their local elementary school to try to force the school to give their children the right to be taught English, which the school was denying.

"Double Talk," *supra* (Statement of Ron Unz). The Ninth Circuit repeatedly upheld California's Proposition 227. *Valeria v. Davis*, *supra*; *Calif. Teachers Ass'n v. State Bd. Of Ed.*, 271 F.3d 1141 (9th Cir. 2001).

The California reform movement stimulated Arizona's Proposition 203, which passed with 63% of the vote on the Nov. 2000 ballot. Daniel Gonzalez, "Arizona Win Encourages Bilingual Ed Opponents," *Arizona Republic*, Nov. 20, 2000, A-1.

In 2002, Massachusetts voters adopted Question 2 by a vote of 68% to 32% of those voting.

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[4] PBS Online Newshour, "Double Talk," *Newshour Transcript*, Sept. 21, 1997 ("Double Talk").

Elections Division, State of Massachusetts, "Massachusetts 2002 Election Ballot Question Results".

> Lincoln Jesus Tamayo, statewide chair of English for the Children of Massachusetts, argued that a ballot initiative was the only solution. "As a Latino immigrant child who arrived in America speaking no English, I know the importance of learning that language. As a high school principal, I have seen the dismal results of our current so-called bilingual programs, which teach English much too slowly. And as Chairman of the Massachusetts Bilingual Education Advisory Council, I recognized the hopelessness of legislative efforts to reform this dreadful system of Spanish-only instruction. We've already lost too many generations of Latino students; the 'English for the Children' initiative is their only chance."
>
> The views of Mr. Tamayo were seconded by those of Co-Chair Rosalie Pedalino Porter, herself an immigrant child, former director of bilingual programs for Newton, MA, and author of *Forked Tongue*, a powerful critique of bilingual education. "I learned English as a child in school, but was later forced to administer a system which prevented other immigrant children from doing the same. After wasting fifteen years trying to reform bilingual programs, I've decided we must end them instead."

English for the Children of Massachusetts, *Ballot Initiative Campaign Launched to Dismantle Bilingual Education in Massachusetts*, July 31, 2001.

F. Federal Policy Preferences Changed to Favor English Language Acquisition:

This evolution in teaching methods gradually penetrated federal policy, leading to the end of policies and "*Lau* guidelines" preferring bilingual education. In 2001, Congress enacted Title III of the No Child Left Behind Act, Pub.L. No. 107-110, 115 Stat. 1425 ("NCLB").

The NCLB reversed the federal educational priorities for English Language Learners and promoted English language acquisition. *See, e.g.*, Section 1072 of NCLB, replacing "Office of Bilingual Education and Minority Languages Affairs'' and ''Office of Bilingual Education'' in the Department of Education Organization Act (20 U.S.C. 3401 *et seq*.), with ''Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students''.

> Yet we know what happened to bilingual education. It got off track. Instead of kids learning English, we ended up isolating kids, took them on a train track that took them to their language and left them there, put them in schools and classrooms where they basically were being taught in their language and they were not being allowed to learn English essentially, or they were not being asked to learn English.

147 Cong. Rec. S13328 (Dec. 17, 2001)(Statement of Sen. Gregg).

The new Title III of NCLB requires federal grantees "to help ensure that children who are limited English proficient, including immigrant

children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1).

Thus, where "[u]nder the *Lau* Guidelines, plaintiffs argue, 'pressing English on the child is not the first goal of language remediation'," *Castaneda*, 648 F.2d at 1006, under Title III of the NCLB, attaining English proficiency was the first goal. 20 U.S.C. § 6812(1).

The U.S. Department of Education describes the new NCLB requirements for schools as:

> School districts must use Title III funds to provide high-quality language instruction programs that are based on scientifically based research, and that have demonstrated that they are effective in increasing English proficiency and student achievement.
>
> Districts are required to provide high-quality professional development to classroom teachers, principals, administrators, and other school or community-based organizational personnel in order to improve the instruction and assessment of limited English proficient students.
>
> Districts are held accountable for making adequate yearly progress as described in Title I and meeting all annual achievement objectives.

U.S. Dept. of Education, "Title III – Language Instruction For Limited English Proficient And Immigrant Students Language Instruction for Limited English Proficient and Immigrant Students

(III)," *No Child Left Behind: A Desktop Reference* ("NCLB Desktop Reference").

Thus, America's methods for teaching English Language Learners have moved beyond ineffective bilingual education programs measured by "process" or "inputs", toward a result-oriented test of whether children are succeeding. The decision below missed this evolution:

> If anything, after 2000, when Arizona moved away from bilingual education and required most courses to be taught in English, regardless of students' language abilities, these challenges have become greater: a tenth grader, for example, who speaks no English but must pass a biology course taught entirely in English will require considerable assistance.

516 F.3d at 1169.

This statement, central to the Ninth Circuit's belief that more resources were necessary, does not reflect an understanding of the Structured English Immersion program, or its results. The essence of SEI programs is that students are given the assistance necessary, but based on an individual student's needs, not on an assumption that the student will not do well in an English-language curriculum.

SUMMARY OF ARGUMENT

The Ninth Circuit decision below made two fundamental errors:

- misunderstanding and misapplying the *Castaneda* test long used to evaluate claims under the Equal Educational Opportunities Act; and,

- misunderstanding Title III of the No Child Left Behind Act, and misapplying the relationship between the EEOA and Title III.

Both errors stem from the same root: a failure of the Ninth Circuit to understand the evolution in methods for teaching English Language Learners, described *supra*.

The three-part *Castaneda* test was formulated to permit courts to evaluate claims under the Equal Educational Opportunities Act, the post-*Lau* effort to insure that school systems made a "good faith" effort to assist English Language Learners. The Ninth Circuit attempted to apply the *Castaneda* test in this case, but did not understand it. As a result, the Ninth Circuit changed the *Castaneda* test from one focused on results, to one measuring inputs. Because demands for more money are limitless, this change mires the Ninth Circuit in inappropriate legislative decision-making, and contradicts the evolution of teaching methods now reflected in federal law.

In addition, the Ninth Circuit distorted and mis-applied the results test which is explicitly part of the *Castaneda* test. The lower court recited, but dismissed evidence that Arizona is achieving the kind of results sought in the No Child Left Behind Act and the EEOA.

Similarly, the decision below misunderstood the relationship between the EEOA and Title III of the NCLB. In the context of the evolution of teaching methods, described *supra*, Title III of the NCLB can be seen as the legislative ratification of the three-part *Castaneda* test. In particular, both the third prong of the *Castaneda* test and Title III require measurable results. The Ninth Circuit could not connect the two results tests, even though they are essentially the

same. Thus, the Ninth Circuit not only failed to understand the *Castaneda* test and how it applies to Arizona's program, but also how the EEOA and Title III harmonize toward the same goal.

Adopting the Ninth Circuit's new formulation of the EEOA might resurrect one of the chief criticisms of ineffective bilingual education programs: that they keep English Language Learners segregated longer than necessary, not only slowing their English language acquisition but impeding their ability to learn school subjects taught in English. Schools which see ELL assistance programs as means to squeeze additional funds out of reluctant legislatures would feel pressure to keep the students in the programs longer. This would mean that the Ninth Circuit would be promoting exactly what it purports to solve: keeping English Language Learners away from English proficiency.

ARGUMENT

I. THE DECISION BELOW DISTORTS AND MISAPPLIES THE *CASTANEDA* TEST.

A. The Equal Educational Opportunities Act:

The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f), says, in relevant part: "No State shall deny equal educational opportunity to an individual . . . by – (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

The legislative history of the EEOA "is very sparse, indeed almost non-existent." *Castaneda*, 648 F.2d at 1001. "The EEOA was a floor amendment to the 1974 legislation amending the Elementary and Secondary Education Act of 1965, 88 Stat. 338-41." *Id*.

The interpretation of Section 1703(f) has generally centered on the requirement that schools take "appropriate action to overcome language barriers."

> The difficult question presented by plaintiffs' challenge to the current language remediation programs in RISD is really whether Congress in enacting § 1703(f) intended to go beyond the essential requirement of *Lau*, that the schools do something, and impose, through the use of the term "appropriate action" a more specific obligation on state and local educational authorities.

Castaneda, 648 F.2d at 1008.

In *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D.N.M.1972), *aff'd on other grounds*, 499 F.2d 1147 (10th Cir. 1974), the district court found an unconstitutional denial of equal educational opportunity. The Tenth Circuit affirmed the decision on the non-constitutional ground of Section 601 of Title VI. The court further stated that because Section 601 gives a right to bilingual instruction, bilingual-bicultural education can be ordered. 499 F.2d at 1154.

The Tenth Circuit, in *Keyes v. School District No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976), criticized *Serna*, refused to order bilingual-bicultural education as a remedy, and

expressly held that a specific program of bilingual-bicultural education was not required by the Fourteenth Amendment. On the other hand, in *United States v. Texas Education Agency*, 532 F.2d 380, 398 (5th Cir.), *vacated sub nom. Austin Independent School District v. United States*, 429 U.S. 990 (1976), a certain form of bilingual-bicultural education was held to be a proper part of a remedy fashioned by the district court to eliminate de jure segregation. A similar holding where de jure segregation had existed was made in *United States v. Texas*, 342 F.Supp. 24 (E.D.Tex.1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).

The early judicial analysis and application reached perhaps its deepest point in *Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3,* 587 F.2d 1022 (9th Cir 1978). In *Guadalupe*, the Ninth Circuit was asked whether *Lau* and the HEW guidelines required Tempe, Arizona, "to provide all non-English-speaking Mexican-American or Yaqui Indian students attending district schools with bilingual-bicultural education" which, *inter alia*, "reflects the historical contributions of people of appellants' descent to the State of Arizona and the United States." *Guadalupe*, 587 F.2d at 1024.

The Ninth Circuit rejected the request for bilingual-bicultural education:

> We hold that the appellees fulfilled their equal protection duty to children of Mexican-American and Yaqui Indian origin when they adopted measures, to which the appellants do not object, to cure existing language deficiencies of non-English-speaking students. There exists no constitutional duty imposed by the Equal Protection Clause to provide

> bilingual-bicultural education such as the appellants request.

587 F.2d at 1026-27. The Ninth Circuit similarly rejected claims under Section 601 of the Civil Rights Act of 1964 and under the EEOA. 587 F.2d at 1029-30.

The Ninth Circuit explained:

> Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, whether the children of this Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures cannot be determined by reference to the Constitution. We hold, therefore, that the Constitution neither requires nor prohibits the bilingual and bicultural education sought by the appellants. Such matters are for the people to decide.

587 F.2d at 1027.

B. The Fifth Circuit Crafted a Three-Part *Castaneda* Test to Evaluate EEOA Claims:

In 1981, the Fifth Circuit handed down the landmark decision in *Castaneda v. Pickard,* 648 F.2d 989 (5th Cir. 1981). The Raymondville, Texas, bilingual education program offered intensive language instruction, in addition to bilingual content instruction, for the first three years. "The articulated goal of the program is to teach students fundamental reading and writing skills in both Spanish and English by the end of third grade." 648 F.2d at 1004-

05. After the third grade, all instruction was in English, with teachers' aides and other assistance for language-minority children. Special programs, including English as a Second Language and special tutoring, were available to all children, with special emphasis on students who moved into the school district after the third grade. 648 F.2d at 1005.

The plaintiffs asserted that the Raymondville program did not comply with the requirements of Title VI, the EEOA, and the *Lau* Guidelines. 648 F.2d at 1006. "Specifically, plaintiffs contend that the articulated goal of the Raymondville program to teach limited English speaking children to read and write in both English and Spanish at grade level is improper because it overemphasizes the development of English language skills to the detriment of the child's overall cognitive development." *Id*.

The Fifth Circuit first swiftly disposed of the Title VI and *Lau* Guidelines questions.

> Whatever the deficiencies of the RISD's program of language remediation may be, we do not think it can seriously be asserted that this program was intended or designed to discriminate against Mexican-American students in the district. Thus, we think it cannot be said that the arguable inadequacies of the program render it violative of Title VI.

648 F.2d at 1007.

The Fifth Circuit then turned to the EEOA question:

> We think Congress' use of the less specific term, "appropriate action," rather than "bilingual education," indicates that Congress intended to leave state and local educational authorities a substantial amount of latitude in

> choosing the programs and techniques they would use to meet their obligations under the EEOA. However, by including an obligation to address the problem of language barriers in the EEOA and granting limited English speaking students a private right of action to enforce that obligation in § 1706, Congress also must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students and deliberately placed on federal courts the difficult responsibility of determining whether that obligation had been met.

648 F.2d at 1009.

The Fifth Circuit then formulated a three-part test which has guided reviews of bilingual education programs since its formulation:

> In a case such as this one in which the appropriateness of a particular school system's language remediation program is challenged under § 1703(f), we believe that the responsibility of the federal court is threefold. First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. . . .
>
> The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to

> remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.
>
> Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.

648 F.2d at 1009-10.

The *Castaneda* test continues to be the benchmark for evaluating challenges to programs to aid English Language Learners. The Fifth Circuit later applied the *Castaneda* test to a statewide

system. *United States v. Texas*, 680 F.2d 356, 371 (5th Cir. 1982). The Seventh Circuit similarly applied the *Castaneda* test. *Gomez v. Illinois State Bd. Of Education*, 811 F.2d 1030, 1041-42 (7th Cir. 1987) (EEOA applies to state as well as local agencies).

The plaintiffs and the court below used the *Castaneda* test in this case. "Flores alleged, consistent with *Castaneda* step two, that Arizona had 'failed to provide financial and other resources necessary for adequate implementation' of its ELL programs." 516 F.3d at 1146.

C. The Decision Below Distorts and Misapplies the *Castaneda* Test:

The lower court's opinion misquotes and misunderstands the *Castaneda* test. Because the court below apparently did not understand the Fifth Circuit's careful analysis in *Castaneda*, its additions converted a "good faith" test into a numerical "resources" test, placing the court in the position of dictating appropriations, rather than evaluating a program.

The court below described the *Castaneda* test as:

> The *Castaneda* framework is three-fold: First, courts must be satisfied that the "school system is purs[uing] a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy." *Castaneda*, 648 F.2d at 1009. Second, "the programs and practices actually used by a school system [must be] reasonably calculated to implement effectively the educational theory adopted by

> the school." *Id*., at 1010. *There must, in other words, be sufficient "practices, resources and personnel ... to transform the theory into reality." Id*. Third, even if theory is sound and *resources are adequate*, the program must be borne out by practical results. *Id*.

516 F.3d at 1146 (emphases added).

The highlighted language is the Ninth Circuit's distortion of the *Castaneda* test. An analysis of the Arizona programs under the three *Castaneda* prongs illustrates the effect of this switch from substantive analysis to analysis of "process:"

1. ***THEORY:*** *Proposition 203 Adopted a Recognized Educational Theory.*

The first *Castaneda* test is whether the program uses a recognized educational theory. Arizona's Proposition 203 uses a theory proven successful in California, and very similar to that adopted two years later by Congress in Title III of the NCLB Act. No one in this case disputes that Arizona's educational theory is recognized.

2. ***"GOOD FAITH" IMPLEMENTATION:*** *Arizona Has Implemented the Program Appropriately.*

This second *Castaneda* prong is the crux of the plaintiffs' challenge in this case. 516 F.3d at 1146. The Ninth Circuit has converted the second prong of the *Castaneda* test from one focused on implementation of theory into a resources test. "ELL students need extra help and that costs extra money." 516 F.3d at 1169.

The Ninth Circuit, using its theory that "challenges have become greater" under Arizona's

SEI program, 516 F.3d at 1169, didn't recognize the differences between the old bilingual education program and more modern approaches. The Ninth Circuit excerpted the second prong of the *Castaneda* test to look to specific dollar inputs rather than good faith efforts:

> Second, "the programs and practices actually used by a school system [must be] reasonably calculated to implement effectively the educational theory adopted by the school." *Id*., at 1010. *There must, in other words, be sufficient "practices, resources and personnel ... to transform the theory into reality.*"

Id., emphasis added.

By removing words, the Ninth Circuit converted the second prong into a test of whether the theory could become "reality." This is a results test. The only way to keep the lower court's version of the second prong from being a superfluous results test would be if it were construed solely as an "inputs" test, similar to the old *Lau* Guidelines. Yet the *Castaneda* court, as noted above, summarily rejected the *Lau* Guidelines as a measure to judge compliance with the EEOA. 648 F.2d at 1007.

The futility of the Ninth Circuit's "resources" test can be seen in a comparison of the Nogales schools and those of "the more affluent Scottsdale Unified School District [which] spends more than twice as much money as does [Nogales] for its ELL students, yet Scottsdale's ELL 10th graders score worse on Arizona's AIMS academic achievement tests than [Nogales's] ELL 10th graders." Brief of Petitioner Superintendent ("Superintendent's Br.") at 43 n. 19. Adding more resources is not an adequate measure of implementation or of results.

The second prong is not, in fact, a resources test. It is a balancing test of implementation. What *Castaneda* actually said was that:

> Congress also must have intended to insure that schools made a *genuine and good faith effort*, *consistent with local circumstances and resources*, to remedy the language deficiencies of their students. . . .
>
> The court's second inquiry would be whether the *programs and practices* actually used by a school system are *reasonably calculated* to implement effectively the educational theory adopted by the school.

648 F.2d at 1009 (emphasis added).

Arizona has implemented its Structure English Immersion program appropriately. It has passed legislation to implement the voters' decision. 516 F.3d at 1167. Nogales schools score in the top ranks of Arizona schools. Pet. App., at 363a-366a. Even the Ninth Circuit notes that Arizona has changed its programs to meet the needs of its English Language Learners in these new programs. "[M]any of these specific problems have been solved by better management in NUSD, and because school funding has generally increased. . . ." 516 F.3d at 1168.

The *Castaneda* test is one of "genuine and good faith effort." The Ninth Circuit is familiar with "good faith" tests regarding the implementation of English Language Learner programs. *California Teachers Ass'n*, 271 F.3d at 1154-55 (upholding California's Prop. 227, in part, by looking at a variety of "good faith" tests).

The Ninth Circuit did not use its own "good faith" test, or the *Castaneda* "good faith implementation" test in this case. Perhaps the Ninth

Circuit believed that it could evaluate and disregard competing resource claims to satisfy the requirements of the EEOA, but having both ignored the evolution in education theory and practice and made a flawed assumption about the resources needed to implement English immersion programs, the Ninth Circuit was in no position to judge whether Arizona's effort was "genuine" or in "good faith." Thus, it had to look solely to a dollar-input test.

The difficulty with the "process mentality" below was predicted by the Fifth and Seventh Circuits:

> Among these are such questions as how broad a power of "de novo" review and revision may be exercised by a district court over language barrier programs, consistent with the rule that Congress cannot invest Article III courts with jurisdiction to "exercise functions which are essentially legislative or administrative."

Castaneda by Castaneda v. Pickard, 680 F.2d 456, 471 n. 24 (5th Cir. 1986); *Gomez*, 811 F.2d at 1041 ("we must be careful not to substitute our suppositions for the expert knowledge of educators or our judgment for the educational and political decisions reserved to the state and local agencies").

Demands for funds are endless. Schools can always find a reason to "need" more funds. Determining appropriations levels by balancing these competing demands is one of the "quintessentially legislative" functions. *Sorenson v. Secretary of Treasury of U.S.,* 475 U.S. 851, 865 (1986).

Because it failed to understand the nature of the second prong of the *Castaneda* test, the decision below both inappropriately muddied the test itself

and unnecessarily injected itself into legislative resources decisions. The *Castaneda* test was carefully drawn to avoid separation of powers issues while protecting English Language Learners; the Ninth Circuit's ambiguous rewrite was not.

3. ***RESULTS:*** *Arizona's SEI Program is Achieving Results Better Than Its Prior Bilingual Education Program.*

As shown by the long evolution of English Language Learner teaching, the third prong of the *Castaneda* test is perhaps the most important: does the program get results?

The EEOA does not establish measures for determining results. Title III of the No Child Left Behind Act does: "to help ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1).

Arizona does seem to be getting results. Arizona's ELLs who have successfully completed Arizona's new "Structured English Immersion" program perform better on tests of mathematics, and English language writing and reading skills than do native-English-speaking children. Accountability Division, Research and Evaluation Section, Arizona Dept. of Education, "State Report Cards," Dec. 29, 2008.

For example, in Fiscal Year 2007, 82% of ELLs in their second year of classification as English Proficient ("CFEP2") passed their Arizona

Instrument to Measure Standards ("AIMS") test in writing in English, compared to only 78% of native English speakers. *Id*. 71% of the CFEP2 students passed their AIMS math test, compared to 68% of native English speakers. *Id*. In Fiscal Year 2008, the achievement figures were comparable between ELLs and native speakers; for example, the AIMS pass rate for CFEP2 students was 72% in math, compared to 74% for native English speakers. *Id.*

The Ninth Circuit dismissed the evidence of success, putting these "encouraging" results in a footnote, 516 F.3d at 1170 n. 38, and claiming that "the record does not demonstrate that NUSD is succeeding in rapidly and permanently reclassifying ELL students, nor on the time it takes to reclassify students." 516 F.3d at 1170.

Instead, the lower court simply decried a lack of resources:

> A district in which the *majority* of ELL tenth graders fail to meet state achievement standards while the majority of native English speakers pass is not one whose performance demonstrates that the state is adequately funding ELL programs and so warrants relief from judgment.

516 F.3d at 1170 (emphasis in the original). Given the undisputed evidence that graduates of the program do as well or better than the "majority of English speakers", comparing those who haven't completed the program is premature at best. Otherwise, the lower court would be demanding instantaneous results.

Leaving aside the comparison between different groups, this conclusion doesn't seem to comport with the record. Pet. App., at 363a-366a

(Nogales Unified School District schools rank high on Arizona test scores); Brief for Petitioners ("Legislature's Br.") at 22, 45-46 (describing new programs and resources in Nogales schools), 48 (describing ELL performance on tests).

Again, the Ninth Circuit's position may be dictated by its misunderstanding and mischaracterization of the *Castaneda* test. The opinion below described the third prong as: "Third, even if theory is sound and resources are adequate, the program must be borne out by practical results." 516 F.3d at 1146.

This is not an accurate description, as it substitutes "resources are adequate" for what the *Castaneda* test actually measures:

> Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students *and made bona fide efforts to make the program work* does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and *implemented through the use of adequate techniques*, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.

648 F.2d at 1010 (emphasis added).

The *Castaneda* results test does not include the word "resources," nor does it measure whether "resources are adequate." Instead it measures whether Arizona has "made bona fide efforts to make the program work," and whether, after a reasonable period of time, the program was "implemented through the use of adequate *techniques*." Not adequate "resources," but "adequate techniques." And the essential test, described twice in one paragraph, is whether Arizona had made "bona fide efforts to make the program work."

The last sentence of the *Castaneda* third prong was not mentioned by the Ninth Circuit: "We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been 'appropriate' when adopted, in the sense that there were sound expectations for success and *bona fide efforts to make the program work*, has, in practice, proved a failure." 648 F.2d at 1010 (emphasis added).

The *Castaneda* court sought "bona fide efforts" to ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet. This is the same standard set by the NCLB. This is also what language-minority parents have sought for many years, and, by the available evidence, this is what Arizona has apparently provided.

The lower court's failure to understand and apply the *Castaneda* test threatens to confuse schools and parents about the requirements for teaching

English Language Learners, leading to the same sort of pedagogical morass that followed the *Lau* Guidelines. This Court should not permit the decision below to undermine the needs of English Language Learners.

II. THE DECISION BELOW DISTORTS AND MISAPPLIES THE RELATIONSHIP BETWEEN THE EEOA AND THE NCLB.

The decision below similarly failed to understand the evolution of federal policy from the EEOA to Title III of the NCLB. The EEOA required "appropriate means to overcome language barriers." 20 U.S.C. § 1703(f). The later-passed Title III of the NCLB sets specific federal policy for what "means" are "appropriate" enough to deserve federal funding.

The *Castaneda* test is the long-standing measure of whether the EEOA is being satisfied. If the three goals of the NCLB are the same as the three prongs of the *Castaneda* test, then satisfying the NCLB means satisfying the EEOA. If that is true, the Ninth Circuit's opinion is fatally flawed.

A. The Goals of the EEOA and Title III of the NCLB Are The Same:

The *Castaneda* test requires, as shown *supra*, a recognized theory, appropriate implementation, and measurable results:

> We also laid down a three-step test for compliance with section 1703(f): Is the program based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field? Is it reasonably calculated to

> implement that theory? Has it, after being used for a time sufficient to afford it a legitimate trial, produced satisfactory results?

United States v. Texas, 680 F.2d at 371.

Title III of the No Child Left Behind Act sets three goals, which are essentially the same as the three prongs of the *Castaneda* test:

- scientifically-based theory;
- adequate implementation, including teacher development; and
- measurable results.

> School districts must use Title III funds to provide high-quality language instruction programs that are based on scientifically based research, and that have demonstrated that they are effective in increasing English proficiency and student achievement.
>
> Districts are required to provide high-quality professional development to classroom teachers, principals, administrators, and other school or community-based organizational personnel in order to improve the instruction and assessment of limited English proficient students.
>
> Districts are held accountable for making adequate yearly progress as described in Title I and meeting all annual achievement objectives.

NCLB Desktop Reference, *supra*.

B. Title III Is An Individually-Focused Civil Rights Law:

The court below dismissed the requirements of Title III as only applicable to schools, and not children:

> The EEOA is just such a rights-enforcing law. It requires states "to ensure that needs of students with limited English language proficiency are addressed," *Idaho Migrant Council v. Bd. Of Educ.*, 647 F.2d 69, 71 (9th Circ. 1981), by requiring them to remove barriers to equal participation in educational programs now rather than later, and it provides students with a right of action to enable them to enforce their rights, *see*, 20 U.S.C. § 1706 . . . The EEOA's concerns, in other words, lie fundamentally with the current rights of individual students, while NCLB seeks gradually to improve their schools.

516 F.3d at 1173.

The Ninth Circuit has it backwards. To a student trapped in an ineffective bilingual education program, like Rita Montero's son, Camilo, the NCLB is a civil rights law, "requir[ing] states 'to ensure that needs of students with limited English language proficiency are addressed,' . . . by requiring them to remove barriers to equal participation in educational programs now rather than later." 516 F.3d at 1173.

The sponsors of Title III explicitly thought their changes would aid individual students in achieving equality in American society:

> Our school system should not isolate kids and not allow them to learn English. So we change the bilingual program so now the stress in bilingual education is going to be teaching kids to learn English so that they can compete in our world, compete in America, and have a shot at the American opportunity.

147 Cong. Rec. S13328 (Dec. 17, 2001)(Statement of Sen. Gregg).

In addition, Title III focuses on individual students. In March 2006, Irene Moreno, head of the English Acquisition United for the Arizona Department of Education described the four strategies she believed accounted for the demonstrated success of Nogales schools:

- small Structured English Immersion classes that emphasized English language development;
- intervention strategies to assist individual students who needed special attention;
- tutoring before, during and after school; and
- software-based evaluation providing immediate feedback on individual students' needs.

Superintendent's Br., at 26. These strategies, which satisfy Title III, are focused on the "current rights of individual students" rather than "seek[ing] to gradually improve their schools." 516 F.3d at 1173.

C. The Ninth Circuit's Approach Could Harm, Not Help, Children:

The Ninth Circuit overlooked one major purpose of Title III: to insure accountability on the basis of measurable results. One reason for this emphasis is that, under the old bilingual education programs, children were kept in these ineffective programs far longer than necessary. *See, e.g.*, H.R. Rep. 107-63, Pt. 1, at 277.

If implemented, the Ninth Circuit's "input" approach, measured by dollars spent per English Language Learner in these programs, could lead to the old result. Schools would have an incentive to

keep students in the programs longer than necessary, in order to attract more education funding. That would violate the purposes of both the EEOA and Title III of the NCLB: to teach children English and move them into parity with other students as quickly as possible.

Ironically, this perverse incentive to retain ELLs in special programs longer would run counter to the Ninth Circuit's principal criticism, noted above, that Arizona's programs do not "reclassify" students quickly enough. 516 F.3d at 1170 n. 38. Yet, history suggests that this is the likely result of the Ninth Circuit's own "put more money in" approach.

The Ninth Circuit's failure to understand the evolution of ELL education led it to a failure of analysis. This Court must understand the evolution, and the consequences, to see how these many disparate factors have come together to produce a success, not a failure, in Arizona.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request this Court to reverse the decision below.

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